IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7158 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VAHIDBHAI SAIYADBHAI SHEIKH

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 7158 of 2003

MR MM TIRMIZI for Petitioner No. 1

MS MITA PANCHAL Ld. AGP for Respondent No. 1-3

MS PJ DAVAWALA for Respondent No. 4

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 28/08/2003

ORAL JUDGEMENT

By way of this special civil application, the petitioner has challenged the order passed by the

District Magistrate, Ahmedabad on 22.2.2003 in exercise of powers under sec. 3(1) of the Prevention of Blackmarketing & Maintenance of Supplies of Essential Commodities Act, 1980 (hereinafter referred to as "the PBM Act" for short) directing detention of the present petitioner under the above said Act because the District Magistrate, Ahmedabad acting under the Act came to the satisfaction that it was necessary to prevent the petitioner from acting in any manner prejudicial to maintenance of supplies of essential commodity like kerosene essential to the community. The petitioner came to be detained in pursuance of the above said order from 31.3.2003.

The grounds which are served upon the detenu and placed on record reveal that the Government for the supply of essential commodity like kerosene has made arrangements to supply 12 liters of kerosene to ration card holders at Rs. 8.80ps. To regulate and maintain supply of the essential commodity, the colour of such kerosene is made blue and different from ordinary kerosene available in open market at much higher rate. On 9.12.2002 personnels of the Civil Supplies Department of the Government raided shop of the petitioner named as "Shanu Traders" free sale shop wherein the petitioner was found with 21 barrels of white kerosene. Each barrel containing 200 liters, totalling to 4300/- liters. The bill books were examined and statement of detenu was recorded in which the detenu stated that the kerosene had been obtained from the open market through dealer and, therefore, the detenu was found having breached the control orders of Essential Commodities Act. In the presence of the detenu and in presence of the panchas, nearby the shop, 9800 liters blue kerosene which was essential commodity, was found and detenu stated before the authority that such supply of blue kerosene was purchased by the detenu and was obtained from persons named Mahmad Yusuf Shaikh and Parvez Shaikh, though both the persons have denied to have supplied any blue kerosene to the detenu. Nearby the shop, three trucks were also found by the personnels of Supply Department. The drivers of which stated that the said kerosene was supplied by the detenu to them for utilization as fuel in the said truck. The detenu also revealed the process how the blue kerosene was turned into white one. All those materials were seized by the personnels of Government Department which amounted to Rs. 1,71,480/-, therefore, the allegation against detenu is after obtaining supply of blue kerosene which is essential commodity and made available by the Government to certain class of people at subsidized rate was obtained by the detenu and by process

the same was turned into white kerosene and was sold in the free sale market on much higher rate and, thereby the detenu act prejudicially to maintenance of supplies of essential commodity like blue kerosene. It appears that, as alleged, the authority found the activities of the detenu two fold; firstly, obtaining supply of blue kerosene in contravention of Essential Commodities Act and, secondly, by a process converting said kerosene in white one and selling the same in free sale market with higher rate including to the truckers who in turn utilize this kerosene as an adulterated fuel. From the above said facts, the detaining authority came to the subjective satisfaction that except the action under the PBM Act there was no alternative to prevent the activities of detenu which were prejudicial to maintenance of supply of essential commodities. According to proposing authority, alternative steps such as filing of prosecution under sec. 3 read with sec. 7 of the PBM Act was of no avail because on filing such prosecution, the petitioner was likely to be released on bail and was likely to continue his activities to act prejudicial to maintenance of Supplies of Essential Commodities Act.

Mr. MM Tirmizi ld. advocate for the petitioner, Ld. AGP Ms. Mita Panchal for respondent no. 1 to 3 and Ms. PJ Davawala ld. Addl. Central Govt. Standing Counsel were heard at length. Ms. Davawala has placed on record the affidavit on behalf of Union of India, which is taken on record.

Ld. Advocate Mr. Tirmizi for the petitioner raised various contentions alleging the order of detention and contended that the order impugned is vitiated on the ground that without even filing of the prosecution, detaining authority came to subjective satisfaction that even if the prosecution is lodged, the detenu was likely to be released on bail and was likely to continue his activity. The second contention raised in respect of delay caused in passing of the order. The raid which was carried out according to the ld. advocate for the petitioner on 19.12.2002 and the order of detention was passed on 22.2.2003. According to the ld. advocate, this delay is fatal for the passing of this order of detention against the petitioner and the petition is required to be allowed on this ground alone. The next ground which was urged was in respect of illegible copies of the documents supplied to the petitioner which was relied upon by the detaining authority for which though effective representation was made to the Secretary, Civil Supply Department on

10.5.2003, no legible copies were made available to the petitioner, therefore, in view of the ld. advocate for the petitioner, the order was vitiated. For his contentions, ld. advocate has relied upon certain decisions of this court and the Apex Court, mainly in the matter of Amritlal and other v. Union Government through Secretary, Ministry of Finance and Others as reported in AIR 2000 SC 3675. As against this, ld. AGP Ms. Panchal has controverted vehemently the contentions urged on the ground that the order is vitiated because the detaining authority came to the conclusion that the petitioner was likely to be released on bail for which, she has relied upon two decisions of the Apex Court, one in the matter of Meena Jayendra Thakur vs. Union of India and others, as reported in (1999)8 SCC p. 177 and in the matter of Ahamed Nassar vs. State of Tamil Nadu and others, as reported in (1999)8 SCC p. 473. It was argued that basing his opinion on the material produced, the detaining authority come to a correct conclusion that petitioner was likely to be released on bail and to continue his activities. So far as the ground of delay is concerned, it was urged that this contention was raised recently by way of amendment in the petition and that cannot be met with unless proper affidavit is filed. It was also stated that the copies which were supplied to the detenu were legible copies and those copies which complained of, are the copies of the record in possession of the petitioner.

The prime question of consideration, after carefully going through the record and rival contentions, is, whether from the material on record, the detaining authority reached to correct subjective satisfaction. In the matters of detention, prevention is the object and not the punishment. Preventive action is more important than punishment because it affects the Constitutional guarantee granted to a citizen of free movement, while punishment is always awarded after the fair trial to the accused according to law and, therefore, whenever preventive action is proposed to be taken, the liberty of citizen is the vital issue which is required to be considered and that too from the material on record. It is not the free will by which the authority concerned can satisfy itself subjectively, but this satisfaction though subjective must be derived from objective material. In the matter of Rajesh Gulati vs. Govt. of NCT Delhi and anr., as reported in (2002) 7 SCC 129, the Apex Court observed as under in paras-11 and 12 of the decision:

"11. We are of the view that the High Court

erred in accepting the respondents' submissions and rejected the appellant's writ application. This Court has repeatedly held that the law permitting preventive detention must be meticulously followed both substantively and procedurally by the detaining authority. (See Icchu Choraria v. Union of India; Vijay Marain Singh v. State of Bihar, AIR at p. 1345; Hem Lall Bhandari v. State of Sikkim, AIR at p. 766; and Ayya v. State of U.P., AIR at pp. 364, 367.) The fact of this case show a breach of both.

12. It cannot be overemphasized that the object of detention under the Act is not to punish but to prevent the commission of certain offences. Section 3(1) of the Act allows the detention of a person only if the appropriate detaining authority is satisfied that with a view to preventing such person from carrying on any of the offensive activities enumerated therein, it is necessary to detain such person. The satisfaction of the detaining authority is not a subjective one based on the detaining authority's emotions, beliefs or prejudices. There must be a real likelihood of the person being able to indulge in such activities, the inference of such likelihood being drawn from objective data."

Than the next issue is what should be the relevant consideration for the preventive action. The authority concerned must reach to a satisfaction that prevention is necessary and compelling to prevent a person from carrying on any offensive activity for which he is proposed to be detained. As said above by the Apex Court, this satisfaction must have been based upon objective consideration. The core and backbone of the preventive action must be behavior of a person who is proposed to be detained. The authority concerned, therefore, is undoubtedly and by law of preventive detention is obliged to look into this vital aspect objectively. In other words, apprehension of the authority concerned about future behavior of a detenu prejudicial to society must have been passed on relevant and objective consideration. In this respect, there must be material before the detaining authority that material must be emanating sufficient indication of repeating prejudicial behavior. It may be that the frequency of similar occasions sometimes may not be leading to apprehension of repeating tendency. At the same time, a

solitary action also may cause sufficient apprehension of repeating of such behavior. It all depends upon the facts and circumstances of each case and what was the material before the detaining authority to reach to satisfaction. Mere committing of an offence may not reasonably cause an apprehension of committing the same offence by the concerned person. If that be so, than there must be some material especially when preventive action is proposed that from given material one can reasonably apprehend that the person alleged was likely to continue his activity. In the matter of Chowdarapu Raghunandan v. State of Tamil Nadu and ors, reported in (2002)3 SCC p. 754, in para-13 the Apex Court has observed as under:

"13. It is true that in appropriate case, an inference could legitimately be drawn even from a single incident of smuggling, that the person may indulge in smuggling activity but for that purpose antecedents and nature of the activities carried out by a person are required to be taken into consideration for reaching justifiable satisfaction that the person was engaged in smuggling and that with a view to prevent, it was necessary to detain him. It is also settled law that an order of preventive detention is founded on a reasonable prognosis of the future behaviour of a person based on his past conduct judged in the light of the surrounding circumstances. Such past conduct may consist of one single act or a series of acts. It must be of such a nature that an inference can reasonably be drawn from it that the person concerned would be likely to repeat such acts so as to warrant his detention. If there is non-application of mind by the authority on this aspect, then the court is required and is bound to protect the citizen's personal liberty which is guaranteed under the Constitution. Subjective satisfaction of the authority under the law is not absolute and should not be unreasonable. The question, therefore, would be from the past conduct of the petitioner as set out in the grounds of detention or other circumstances, whether reasonable inference could be drawn that he is likely to repeat such acts in the future. In the present case, past conduct of the petitioner is that he is an engineering graduate and at the relevant time he was the Managing Director of a public limited company. There is no other allegation that he was involved

in any other anti-social activities. The only allegation is that he visited Singapore twice as a "tourist". Admittedly, the petitioner has filed bail application in a criminal prosecution for the alleged offence narrating the fact that his so-called statement was not voluntary and was recorded under coercion. The baggages were not belonging to him and there were no tags on the same so as to connect him with the said baggages and the crime. At the time of hearing of this matter also, it is admitted that the baggages were without any tags. It is also an admitted fact that there is nothing on record to hold that the petitioner was involved in any smuggling activity. However, the learned Additional Solicitor-General submitted that in the statement recorded by the Customs Department the petitioner had admitted that previously he had visited Singapore twice as a "tourist", and, therefore, it can be inferred that the petitioner might have indulged and was likely to indulge in such activities. This submission is far-fetched and without any foundation. From the fact that a person had visited Singapore twice earlier as a "tourist", inference cannot be drawn that he was involved in smuggling activities or is likely to indulge in such activities in future. Hence, from the facts stated above it is totally unreasonable to arrive at a prognosis that the petitioner is likely to indulge in any such prejudicial activities."

In the same decision, in para-5 the Apex Court observed as under:

"5. Before deciding the contention raised by the petitioner, it is to be reiterated that the preventive detention is not a punitive Act and it is not an alternative to criminal trial under the law. It does not empower the authority to punish a person without trial. Its purpose is to prevent a person from indulging in activities, such as smuggling and/or such other anti-social activities as provided under the preventive detention law."

Adverting to the facts of this case, when the grounds served upon the detenu were scanned and the material which was produced before the detaining authority, there is no whisper of fact that a breach of provisions of Essential Commodities in the facts and circumstances of this case would cause reasonable apprehension to the extent of subjective satisfaction of the detaining authority that the detenu shall continue his activities and that the only compelling remedy was by way of preventive detention. The detaining authority has come to the conclusion that an alternative remedy by prosecution was thought for but in such a case the detenu was likely to be released on bail and was likely to continue his activity prejudicial to maintenance of supply of essential commodity. I could not find any material provided to the detenu or from the grounds that there was an iota of material before the detaining authority to come to subjective satisfaction that the detenu had such a repetitive tendency to indulge in the activity alleged against him. The record discloses that its an allegation against the detenu that he was found in possession of blue kerosene as well as white kerosene and instruments like acid to convert blue kerosene in white kerosene, coupled with the statement of the detenu and a panchanama but it is nowhere recorded by the detaining authority that this incident ipso facto reveal the tendency on the part of the detenu that if he is not prevented by detention he was likely to indulge in such activity, in other words, what is revealed by the material on record, is, at the most commission of offence, be it under Essential Commodity Act, may be graver one, but from that record it never flows that the detenu was possessing such tendency of repeating this behavior in future.

So far as the first contention raised as to the non-application of mind by the detaining authority, while detaining authority came to the conclusion that prosecution was not sufficient remedy because the detenu was likely to be released on bail, ld. advocate for the petitioner has buttress his contention relying on a ratio laid down by the Apex court in the matter of Amritlal and other vs. Union Government (supra). As against this, ld. AGP has relied upon two decisions of the Apex Court. In the matter of Meena Jayendra Thakur vs. Union of India (supra). The facts of those two cases were different. The detenu was absconding after passing of the order and was arrested in some other offence when an order of detention came to be served upon the detenu. In these circumstances, the Supreme court observed that the detaining authority reached to further satisfaction that

the consideration of all relevant materials including the fact that there may be possibility of detenu being released on bail, the detaining authority passed the order of detention. What is ruled by the Supreme Court in above two decisions is not opposite to the ratio laid down by the Supreme Court in the matter of Amritlal and other vs. Union Government (supra). Likewise, in the matter of Ahamed Nassar vs. State of Tamil Nadu (supra) more clearly in para-46 of the decision, the Apex Court observed as under:

"46. So before the detaining authority, there existed not only the order dated 12.4.1999 rejecting his bail application but the contents of the bail application dated 1.4.1999. The averments made therein are relevant material on which subjective satisfaction could legitimately be drawn either way. Thus, in spite of rejection of the bail application by a court, it is open to the detaining authority to come to his own satisfaction based on the contents of the bail application keeping in mind the circumstances that there is likelihood of the detenu being released on bail. Merely because no bail application was then pending is no premise to hold that there was no likelihood of his being released on bail. The words "likely to be released" connote chances of being bailed out, in case there be pending bail application or in case if it is moved in future is decided. The word "likely" shows it can be either way. So without taking any such risk if on the facts and circumstances of each case, the type of crime to be dealt with under the criminal law, including contents of the bail application, each separately or all this compositely, all would constitute to be relevant material for arriving at any conclusion. As the contents of bail application would vary from one case to the other, coupled with the different set of circumstances in each case, it may be legitimately possible in a given case for a detaining authority to draw in inference that there is likelihood of the detenu released on bail. The detention order records:

"The Administrator of National Capital Territory of Delhi is aware that you are in judicial custody and had not moved any bail application in the court(s) after 9.6.1992 but nothing prevents you from

moving bail applications and possibility of your release on bail cannot be ruled out in the near future. Keeping in view your modus operandi to smuggle gold into India and frequent visits to India, the Administrator of the National Capital Territory of Delhi is satisfied that unless prevented you will continue to engage yourself in prejudicial activities once you are released."

In para-47, therefore, Supreme Court observed that in the said case subjective satisfaction of the detaining authority that there was likelihood of detenu being released on bail was not based on no relevant material and exactly this is the ratio laid down by the Apex Court in the matter of Amritlal and other vs. Union Government (supra). Before coming to the conclusion whether the detenu was likely to be released on bail, the detaining authority must base his satisfaction on cogent material. Strikingly, in this case, the authority did not choose even to file prosecution and the question of detenu being released on bail could be considered when prosecution is filed and some material is placed before the detaining authority that the detenu was likely to be released on bail. The detaining authority, in this case, instead has chosen to rely upon one incident and from the said incident, the detaining authority reached to subjective satisfaction that the detenu was likely to continue his activities in future when there was no material at all on record revealing such repeating tendency on the part of the detenu. The order of detention, therefore, is vitiated by vice of non-application of mind.

In this view of the matter, this special civil application is allowed. The order impugned in this special civil application passed on 22.2.2003 by the District Magistrate, Ahmedabad under sec. 3(1) of the PBM Act against the petitioner is quashed and set aside. The petitioner is directed to be set at liberty forthwith, if he is not required to be detained for any other purpose. Rule made absolute with no order as to costs. DS Permitted.

(J.R. VORA, J.)

mandora/